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In the Supreme Court of the United States

OCTOBER TERM, 1975

THE FIRST NATIONAL BANK OF CHICAGO,

Petitioner,

vs.

STATE OF ILLINOIS ex rel. RICHARD K. LIGNOUL, Commissioner of Banks and Trust Companies, State of Illinois,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The First National Bank of Chicago petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case entered on May 27, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is appended as Appendix A. The opinion of the District Court, reported in 409 F. Supp. 1167 (N.D. Ill. 1975), is appended as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Should the congressional doctrine of "competitive equality", as enunciated by this Court in *Plant City**, be frustrated by the failure below to construe the McFadden Act** in accordance with the actual competitive situation between national and state banks in each particular state?

STATUTES INVOLVED

Federal Statutes:

12 U.S.C. §36(f)

12 U.S.C. §36(c)

Illinois Statutes:

Ill. Rev. Stat., ch. 16½, §102 (1975)

Ill. Rev. Stat., ch. 16½, §105(11) (1975)

Ill. Rev. Stat., ch. 16½, §106 (1975)

The relevant statutes are quoted in full in Appendix C.

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* *First Nat'l Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969) (*"Plant City"*).

** 12 U.S.C. §36.

STATEMENT

Petitioner, The First National Bank of Chicago ("First National"), is a national banking association organized under the National Bank Act (12 U.S.C. §21 *et seq.*) with its main office in Chicago, Illinois. In 1975, First National established its "Bank at Work" program, designed to encourage employees and employers to deposit salary payments directly into individual employee bank accounts with First National. In furtherance of this program, First National established and operated five customer-bank communication terminals ("CBCT's") at four employer locations in the City of Chicago and in nearby suburban municipalities.

These CBCT's are unmanned electronic devices, which permit a customer by insertion of a plastic card into the CBCT to initiate: (i) the withdrawal of cash from his checking or savings account, (ii) cash advances on a credit card account, (iii) the deposit of checks or cash to his checking or savings account, (iv) the transfer of funds between checking and savings accounts, and (v) the payment of First National installment loans or credit card charges and the payment of certain utility bills.

On September 22, 1975, the State of Illinois on the relation of the Illinois Commissioner of Banks and Trust Companies ("Commissioner"), filed with the United States District Court for the Northern District of Illinois a complaint seeking a declaratory judgment that First National's CBCT's are branch banks, as defined under the McFadden Act (12 U.S.C. §36(f)), and consequently prohibited to national banks in Illinois under 12 U.S.C. §36(c) and §6 of the Illinois Banking Act (Ill. Rev. Stat., 1975, Ch. 16½, §106). The Commissioner's complaint also

sought an injunction barring establishment and operation of First National's CBCT's. The District Court below held on December 29, 1975, in its Memorandum Opinion that First National's CBCT's are not branch banks insofar as the cash withdrawal and bill payment functions are concerned, but are branches under 12 U.S.C. §36(f) insofar as the cash advance, deposit initiation and transfer functions are concerned. On appeal and cross-appeal, the United States Court of Appeals for the Seventh Circuit held that First National's CBCT's constitute branch banks in all respects, including the cash withdrawal and bill payment functions.*

The decisions of the District Court and the Court of Appeals below also apply to the companion case of *State of Illinois ex rel. Richard K. Lignoul, Commissioner of Banks and Trust Companies* v. *Continental Illinois National Bank and Trust Company of Chicago,* which involves not only unmanned CBCT's but also manned point-of-sale ("POS") terminals located in Chicago area grocery stores. First National respectfully refers the Court to the Petition for a Writ of Certiorari (No. 75-1900) filed with the Court on June 30, 1976, by Continental Bank ("Continental Petition") in its related case for further discussion of the operation of CBCT's and the more general subject of electronic funds transfer.

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* It should be noted that on July 8, 1976, the Chicago City Council enacted an ordinance, which permits banks located in Chicago to establish and operate an unlimited number of CBCT's in Chicago. This ordinance should have no bearing on this case because some of First National's CBCT's are located outside of the city limits of Chicago and are not covered by the ordinance.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Below Decided an Important Issue of Federal Law in a Manner Contrary to a Prior Decision of This Court.

In holding that CBCT's are "branches" within the meaning of 12 U.S.C. §36(f), the Court of Appeals below was interpreting the key provision of an important federal statute. That statute controls the competitive relationship between national and state banks insofar as branching is concerned; it is the cornerstone on which the dual system of national and state banks in the United States rests. The decision below will have significant consequences for the national banking system, in view of the widespread and growing use of CBCT's by both national banks and the state banks with which they compete. Thus, even if the decision below were correct, it has such broad implications as clearly to warrant review by this Court.

The fact is, however, that the Court of Appeals' decision, and the District of Columbia Circuit's *IBAA** opinion on which it relied, were manifestly incorrect in concluding that the statutory term "branch" encompasses CBCT's. As the Continental Petition has shown, such a holding cannot be reconciled with this Court's insistence in the *Plant City* case that Congress intended national and state

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* *Independent Banker's Ass'n. of America* v. *Smith*, 402 F.Supp. 207 (D.D.C. 1975), *aff'd.* No. 75-1786 (D.C. Cir., March 23, 1976) (*"IBAA"*). For the convenience of the Court copies of the *IBAA* opinion have been lodged with the Clerk.

bank branching to be governed by a principle of "competitive equality." We agree with Continental Bank's position, and, to avoid repetition, we respectfully refer the Court to the Continental Petition on that point.

II.

The decision of the Court of Appeals below is in conflict with the doctrine of "competitive equality" enunciated by this Court in Plant City.

This Court held in *Plant City* that the definition of "branch" under §36(f) must be construed so as not to "frustrate the congressional intent" that there be competitive equality between national and state banks. (396 U.S. at 134.) The Court's finding that the operation by a national bank in Florida of an armored car service and an off-premises receptacle, both of which took deposits from customers, constituted branch banking under §36(f) was required in order to preserve competitive equality, because Florida absolutely prohibited any type of off-premises activity to state banks in that state. (396 U.S. at 124-25). Had Florida state banks been permitted (in some manner other than pursuant to an explicit state statute, *e.g.*, administrative ruling or tolerance) to operate armored car services and stationary receptacles similar to those operated by the Florida national bank, the principle of maintaining competitive equality would have required that the Florida national bank also be permitted to use such facilities. Therefore, to preserve competitive equality insofar as branching is concerned, it is necessary to consider the actual competitive situation in a particular state before determin-

ing whether a particular off-premises facility is a "branch". Such a consideration is the underpinning of the *Plant City* decision, but the Court of Appeals below wholly failed without explanation to consider the actual competitive situation in Illinois.

(A) The Commissioner has tacitly or expressly approved for operation by Illinois state banks CBCT and other systems which are functionally indistinguishable from First National's CBCT system.

In Illinois there is no judicial authority that CBCT's are branches under state law and thus prohibited to state banks. Indeed, as First National has documented in the uncontroverted record of this case, the Commissioner has given his express or tacit approval to at least two off-premises systems operated by Illinois state banks. These systems are functionally indistinguishable from First National's CBCT system in that they allow customers to initiate deposits and to obtain cash advances and withdrawals away from a bank's premises. The existence of these systems will work to First National's competitive disadvantage if First National is prohibited from operating its CBCT's.

The first such off-premises system is operated by a group of banks in Illinois. (Four of the five banks in the group are Illinois state banks.) This system, which has operated without apparent challenge by the Commissioner, allows customers of any one of the participating banks to use CBCT's located at any of the other participating banks to make cash withdrawals from their checking accounts and also to obtain cash advances on special Master

Charge cards. One can only conclude from the Commissioner's failure to act on this matter, that the Commissioner deems to be lawful the cash withdrawal activities of, and the disbursement of cash advances by, Illinois state banks via off-premises CBCT's.

The other off-premises system operated by an Illinois state bank permits a customer to make off-premises deposits into his bank account through a savings and loan association. By a ruling letter dated January 27, 1975,* the Commissioner has expressly sanctioned this system. This letter evidences the Commissioner's clear policy to administer the Illinois Banking Act to permit off-premises deposit initiation systems. The ability of Illinois state banks to operate such systems under the Commissioner's administrative fiat, while First National is prohibited from so doing under the broad construction of the 12 U.S.C. §36(f) branch definition imposed on it by the Court of Appeals below (and indeed on all national banks by the *IBAA* opinion), places first National at a competitive disadvantage vis-a-vis state banks.

Taken together, these off-premises systems perform the three primary functions of First National's CBCT's—cash withdrawal, cash advance and deposit initiation. By his administrative policy permitting these off-premises state bank activities, the Commissioner has construed and enforced the Illinois Banking Act so as not to include these systems within the definition of "branch" contained therein. Therefore, in order to preserve the "competitive equality" between state and national banks in Illinois with

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* Letter dated January 27, 1975, signed by Bernard R. Rabens, the Commissioner's Chief Examiner in Chicago, a part of the record in this case.

respect to these types of off-premises activities, 12 U.S.C. §36(f) should likewise be construed to exclude First National's CBCT's from the definition of branch.

(B) Section 5(11) of the Illinois Banking Act* will automatically permit Illinois state banks to establish and operate CBCT's if national banks in Illinois are permitted to do so.

In addition to the Commissioner's actual administration of the Illinois Banking Act to permit CBCT's and analogous systems to state banks, the Illinois Banking Act itself contains a provision which will insure that Illinois state banks will be permitted to operate CBCT's if national banks in Illinois are permitted to do so under the National Bank Act. Section 5(11) of the Illinois Banking Act provides that, notwithstanding any other provision of that Act, Illinois state banks may do any act authorized to national banks under federal law. Because of the existence of §5(11) in Illinois,** "competitive equality" is assured in Illinois if First National is permitted to operate its CBCT's under federal law, *i.e.*, if First National's CBCT's are deemed not to be branches under 12 U.S.C. §36(f).

The Court of Appeals below did not consider the competitive situation which exists in Illinois as a consequence of §5(11) of the Illinois Banking Act and of the Commissioner's policy with respect to the operation of off-premises systems by Illinois state banks. That failure to consider the actual competitive situation in Illinois places national banks at a competitive disadvantage compared

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* Ill. Rev. Stat., 1975, ch. 16½, §105(11), quoted in full in Appendix C.

** Several other states have similar provisions in their banking statutes. *See* Continental Petition at 16.

with Illinois state banks. It is of major importance to the national banking system, and to all national banks, each of which is directly affected by the actual competitive situation in the state where it is located, that the status of CBCT's under 12 U.S.C. §36 be determined in a manner which takes into careful account the actual competitive situation with respect to off-premises banking activities in the affected state.

III.

The Ruling Below Is in Conflict Not Only With This Court's Prior Decision in Plant City But With That of Another Circuit as Well.

Even assuming, *arguendo,* that the Court of Appeals below was correct in holding that CBCT's are "branches" within the meaning of 12 U.S.C. §36(f), its judgment was nevertheless in conflict not only with this Court's *Plant City* decision but also with the very *IBAA* decision on which the Court of Appeals relied. As the court in *IBAA* recognized, its expansive definition of "branches" would make it possible for a state, by manipulating its administrative rulings, to permit state banks to use CBCT's while national banks were prevented from doing so by the state's anti-branching statute.* Such a result would, of course, flagrantly violate the principle of "competitive equality" laid down by this Court in *Plant City.* The District of Columbia Circuit declared that in such circumstances 12 U.S.C. §36(c) should be construed to allow national banks to use CBCT's.

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* IBAA (slip opinion at 57-58 and 58n.104).

The situation to which the District of Columbia Circuit was addressing itself is precisely the situation presented here. As the record below undisputedly reflects, the Illinois State Banking Commissioner permits state banks to operate off-premises banking systems that are functionally indistinguishable from CBCT's—presumably on the theory that such systems do not represent branching for purposes of state law. Although these facts—and the District of Columbia Circuit's analysis of the law—were both before the Court of Appeals below, it totally ignored them and ruled that the national banks in Illinois must discontinue their operation of CBCT's. In so ruling, the Court of Appeals placed itself in square conflict with the District of Columbia Circuit.

The *IBAA* court clearly perceived that a blind application of its broad definition of "branch," far from enhancing "competitive equality", in some circumstances could have just the opposite effect. Indeed, the court seemed to recognize that, unless due account were taken of potential abuses by state regulatory authorities, its definition of "branch" simply could not be justified. In short, the District of Columbia Circuit called for a liberal construction of 12 U.S.C. §36(c), not just as a matter of statutory symmetry, but because such a construction is mandated by the principle of "competitive equality" enunciated by this Court. The Court of Appeals' failure to understand this led it into irreconcilable inconsistency with the rulings of both this Court and the District of Columbia Circuit—a conflict in decisions that requires prompt resolution by this Court.

For the foregoing reasons, First National respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

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